IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

NO. 78-425

P. C. PFEIFFER CO., INC., and
TEXAS EMPLOYERS' INSURANCE ASSOCIATION,
Petitioners

v.

DIVERSON FORD and DIRECTOR, OFFICE OF
WORKERS' COMPENSATION PROGRAMS,
Respondents

AYERS STEAMSHIP COMPANY and
TEXAS EMPLOYERS' INSURANCE ASSOCIATION,
Petitioners

v.

WILL BRYANT and DIRECTOR, OFFICE OF
WORKERS' COMPENSATION PROGRAMS,
Respondents

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR THE RESPONDENT, WILL BRYANT

ARTHUR L. SCHECHTER
Two Shell Plaza, Suite 2080
Houston, Texas 77002
Attorney for Will Bryant, Respondent

Of Counsel:
SCHECHTER & SHELTON, INC.

Alpha Law Brief Co., One Main Plaza, No. 1 Main St., Houston, Texas 77002

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BRIEF FOR THE RESPONDENT, WILL BRYANT

OPINIONS BELOW

This case arises under the 1972 Amendments to the Longshoremen's and Harbor Workers' Act. It is before the Court for the second time.

The case originated in the administrative tribunals within the Department of Labor established by the Act. The Administrative Law Judge found no federal jurisdiction, but was reversed by the Benefits Review Board, 2 BRBS 408, reprinted as Appendix 10, pages 93-98.

This decision was affirmed in a single opinion by the Court of Appeals for the Fifth Circuit, reported sub nom *Perdue v. Jacksonville Shipyards, Inc.*, 539 F.2d 533 (1976). This Court vacated the judgment based on that 1976 opinion and remanded the case to the Court of Appeals for the Fifth Circuit for reconsideration in light of the Court's opinion in *Northeast Marine Terminal Co., Inc. v. Caputo*, 432 U.S. 249 (1977). The Court's Order of Remand is reported at 433 U.S. 904 (1977).

After remand, the Court of Appeals reaffirmed its earlier decision based on its prior opinion cited above. The Court's brief opinion reaffirming its prior decision is reported at 575 F.2d 79 (5th Cir. 1978).

This Court again granted certiorari on November 27, 1978.

STATUTE INVOLVED

The relevant portions of the Longshoremen's and Harbor Workers' Compensation Act, as amended, are as follows:

Section 2(3), 86 Stat. 1251, 33 U.S.C. § 902(3):

> The term "employee" means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder and shipbreaker, but such term does not include a master or member of a crew of any vessel, or any person engaged by the master to load or unload or repair any small vessel under eighteen tons net.

Section 2(4), 86 Stat. 1251, 33 U.S.C. § 902(4):

> The term "employer" means an employer any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel).

Section 3(a), 86 Stat. 1251, 1265, 33 U.S.C. § 903(a):

> Compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing or building a vessel.)

REVIEW OF THE FACTS OF THIS CASE

Respondent, WILL BRYANT, sustained injury while working in a warehouse at Pier 23 in the Port of Galveston, Texas, adjoining the navigable waters of the United States. (Appendix, page 47).

In the Port of Galveston, cotton is received by various shoreside compress warehouses from inland shippers of

cotton. The cotton is then drayed by trailers to the pier warehouses where it is removed and shipped out on navigable waters (Appendix, page 47).

At the time of this accident, Mr. Bryant, who was working out of International Longshoremen's Association Local 1308, was rolling a bale along a special purpose cotton dray wagon to the edge of the wagon to tip it over and head it off the wagon in the waterside warehouse (Appendix, page 47).

Though cotton is often taken for loading aboard vessels from the pierside warehouses, as it was on this occasion, it is sometimes directly taken from the shoreside transportation by longshoremen if the vessel on which it is to be shipped is waiting to be loaded (Appendix, page 58). The pier facilities are thus constructed to allow direct transfer from a dray wagon such as that involved in the occurrence in question to shipboard. The actual transfer would be made by deepwater longshoremen. Mr. Bryant, however, would never be required to go aboard ocean-going vessels, though much of his work (as it was on the day in question) was performed adjacent thereto (Appendix, page 51).

When bales of cotton are placed in the warehouse to await the arrival of the ship on which they will be loaded, they are separated and stored in individual lots for shipment and not in an unsegregated mass (Appendix, page 59).

At the time and on the occasion in question, WILL BRYANT'S employer, AYERS STEAMSHIP CO., INC., operated a steamship agency and terminal operation. It had in performing its steamship agency functions, employees who necessarily boarded ocean-going vessels and

performed portions of their duties on the navigable waters of the United States. (Appendix, page 50) In its capacity as a terminal operator it, additionally, received cargo for eventual loading aboard vessels. The cargo was stored in its pierside warehouses until space aboard vessels was ready to receive it or until longshore labor was available to load the cargo. (Appendix, page 50) The cotton on which Bryant was working at the time of his accident was loaded on May 7, 1973, onboard the vessel "KOREAN EXPORTER." (Appendix, page 50)

QUESTION PRESENTED

Whether the Longshoremen's and Harbor Workers' Compensation Act, as amended in 1972, was intended to cover an employee, who is injured while working in the movement of maritime cargo toward shipboard at a covered situs when that worker is not subject to assignment aboard a vessel.[1]

ARGUMENT

I.

INTRODUCTION

It is urged that Congress intended that all handlers of maritime cargo between land and water transportation, within or on a covered situs be embraced by the humanitarian expansion of the Act.

Section 902(3), Title 33 U.S.C. is expansive and provides coverage to all workers on a covered situs who are engaged in "maritime employment".

1. The Petitioner has acknowledged that the situs requirements of the Act have been met (Petitioners' Brief, page 7, note 11.)

In this case, the fact that the Respondent, Will Bryant, was working at a covered area situs is not contested. Accordingly, the only issue is whether or not Mr. Bryant's work was part of the "maritime employment" Congress intended to protect, and whether or not he was an employee within the meaning of Section 902(3) of the Act.

II.

A DEFINITIVE MARITIME EMPLOYMENT TEST AS PROPOSED BY THE RESPONDENT

The Respondent, Will Bryant, agrees with Petitioner that a definitive test of maritime employment is essential to the administration of the Act. However, the test propounded by Petitioners is restrictive, unworkable and would defeat the intent of Congress.

A definitive test, for those employees working in the overall loading and unloading of vessels would be:

> "Whether the injury was sustained while moving or handling maritime cargo between land transportation and water transportation upon a situs covered under Section 3a (33 U.S.C. § 903a) of the Act".

Prior to the 1972 amendments the coverage under the Act was almost exclusively situs oriented: workers on the landward side of the shoreline were not covered; those on the waterside were. Even longshoremen who were injured on a pier permanently affixed to shore were not covered, despite the fact that their function at the time was to assist in the loading and unloading of vessels. *Nacirima Operating Company v. Johnson,* 396 U.S. 212, 90 S.Ct. 347, 24 L.Ed.2d 271.

Petitioners make much in their briefs of cases decided by this Court prior to the 1972 amendments (e.g., *Pennsylvania Railroad Co. v. O'Rourke,* 344 U.S. 334 (discussed at p. 23 of Petitioners' brief); *State Industrial Commission v. Nordenholt,* 259 U.S. 203 (1922), discussed at p. 21 of Petitioners' brief); and *Nogueria v. New York, N.H. and H.R. Co.,* 281 U.S. 128 (discussed on p. 24 of Petitioners' brief). Yet all of these cases turned on situs only. If the occurrence took place on the navigable waters of the United States, it was maritime in nature; if not, it was not. This was true regardless of the function being performed by the injured claimant.

In the 1972 amendments, Congress expanded the limited pre-amendment definition of situs by adding the language "including any adjoining pier, wharf, dry dock, terminal, building way, marine railroad, or other adjoining area customarily used by an employer in loading, unloading, repairing or building a vessel".

In adding this language, the pre-amendment cases turning on situs were effectively rendered irrelevant. Before the 1972 amendments, as the whole test was one of situs, "maritime employment" was defined in the context of where the occurrence took place with little or no judicial note being made of the nature of the task performed.

The addition in 1972, was that the status of the injured worker would have to be tested by what he was doing—whether the work maritime in nature—if the work was performed on a covered situs.

Congress did not intend to limit its definition of maritime employment to only those workers who were actually

loading or unloading a vessel. The legislative intent is clearly more expansive. The Committee reports (H. R. Report No. 92-1441, 92nd Congress, 2nd Session 10-11 (1972)); Senate Report No. 92-1125, 92nd Congress acknowledges that "with the advent of modern cargo handling techniques, such as containerization and the use of L. A. S. H. type vessels, more of a longshoreman's work will be performed on land than heretofore".

This impression that all workers who participate directly or indirectly in the handling of maritime cargo is enforced even more strongly by the congressional observation that "checkers, for example, who are directly involved in the loading or unloading functions are covered by the new amendment".

III.

BRYANT IN LIGHT OF CAPUTO

It is urged that at the time Mr. Bryant sustained injury, he was performing work which was as integral a part of the loading or unloading operation of a vessel as that done by Mr. Caputo or Mr. Blundo in *Northeast Terminal Company v. Caputo,* 97 S.Ct. 2348, 432 U.S. 249 (1977).

The work of Respondent Will Bryant within the confines of the water's-edge warehouse was just as essential to the seaward movement of the cargo into the holds of oceangoing vessels as was the work of deepwater longshoremen who transported it from the water's edge into the hold of the vessel. The cargo moved into the storage area was destined for shipment aboard oceangoing vessels. The cotton involved herein was, in fact, shipped a few

days after the occurrence. The functional relationship of the employee's activity to maritime commerce is the key under *Caputo, supra.* The line Congress intended to draw is not an arbitrary one, but distinguishes between maritime commerce and shore-based commerce. *Sea-Land Services, Inc. v. Johns,* 540 F.2d 629 (3d Cir. 1976).

The Fifth Circuit has similarly espoused this Congressionally intended broad view of coverage. *Alabama Dry Dock & Shipbuilding Co. v. Kininess and the Director, Office of Workmen's Compensation Programs, United States Department of Labor,* 554 F.2d 176; *Texport Stevedore Co. v. Winchester,* 554 F.2d 245 (1977).

Mr. Bryant's connection to the working of cargo was every bit as related to maritime commerce as was Mr. Caputo's. Mr. Bryant was working in an area covered by the Statute, performing labor which resulted ultimately in the more convenient handling of cargo loaded aboard seagoing vessels. Therefore, he was directly involved in the movement of maritime commerce. His work, as strongly as Mr. Caputo's, was performed in the cargo handling operation between the cargo's land transportation and sea transportation.

If any expansion of what Mr. Justice Marshall noted as being a "minimum" for coverage in *Caputo, supra,* is necessary, it is very little.

Mr. Bryant was engaged at the time of injury in placing the bale of cotton into a specific place as part of a specific lot for shipment. If this lot had been containerized, and Mr. Bryant had been rolling the injury-causing bale into a container for subsequent loading, there

would be no doubt as to coverage in light of *Caputo, supra.*

Any delay between the placing of this bale of cotton in the segregated area with the lot with which it was to be shipped, and the date of its subsequent loading, has no significance in light of *Caputo, supra,* at page 274, note 37, wherein the Court noted that:

> " . . . the consignee's delay in picking up the cargo has no effect on the character of the work required to effectuate the transfer of the cargo to the consignee. The work performed by the longshoreman is the same whether performed the day the cargo arrives in port or weeks later."

The unloading of the cargo by Mr. Bryant was the first part of a two-part loading process of the cargo aboard the vessel. To bifurcate this two-part movement and to allow one laborer to be covered and another, whose work is equally important to the movement of maritime commerce in a covered pierside area, to be left uncovered would result in the sort of bifurcation that both Congress and this Court in *Caputo* found so distasteful in the interpretation of the intent of the Act.

Petitioner has correctly pointed out the need for a definitive maritime employment test and has suggested that the test be whether:

> "On the date of his injury, was the employee subject to being assigned by his employer to perform any part of his work on the navigable waters of the United States?" (Petitioner's brief, page 31)

In some cases it is possible that this might be evidentiary of a worker performing a maritime function so

as to entitle him to coverage as in *Caputo, supra.* Yet to make this limited test of whether a worker is in maritime employment would defeat congressional intent.

As this Court noted in *Caputo, supra,* at page 2359, "the language of the amendments is broad and suggests that we 'should take an expansive view of the extended coverage' ".

Section 903a, expansively and clearly defines a covered employee as "any person engaged in maritime employment". If Congress had intended to limit the definition of such employees to the narrow group to whom coverage would be granted under the test proposed by Petitioner, Congress would have so stated. Nothing in the Act indicates that Congress intended to limit the scope of this remedial and humanitarian legislation so severely.

What Congress intended was that coverage extend to anyone when engaged in the overall act of loading or unloading a vessel.

The test suggested by Petitioner of maritime employment, again turns toward "situs" as the primary test. Clearly Congress intends for the test to be one of function. Section 2(3) of the Act makes this premise clear.

Further, this test again seeks to introduce the line set out in *Southern Pacific v. Jensen,* 244 U.S. 205, into consideration. Congress clearly intended to abolish this sort of arbitrary line by its 1972 Amendments.

This Court in *Caputo, supra,* has already noted the Congressional intent of Section 902(3) that the test should be whether the worker was performing a task which was "an integral part of the unloading process."

Further, the fact that Petitioner's suggested test can result in some of the very kinds of bifurcated coverage Congress was trying to correct.[2]

There are, undoubtedly, numerous examples of this sort of loading and unloading operations in different ports with which respondent is simply not familiar.

Petitioner urges that its test would expand coverage to include many various occupations, including maritime investigators and lawyers, ship's chandlers, etc. Respondent has great doubt as to whether Congress intended maritime lawyers or employees of that genre to be covered in its definition of "employee" in § 902(3). In fact, if anything, one could infer from the legislative history that Congress regarded maritime lawyers as being fairly dispensible!

Nonetheless, the Court in this case, need only define the extent to which the term maritime employment be extended to the overall operation of loading and unloading vessels. Other functions, maritime or quasi-maritime

2. For example, in the port of Galveston, there is a specific wharf area where bananas are unloaded. The gang, all hired out of the same union hall, are divided into two groups on a given day. One group goes aboard vessels to rig and work cargo and the other group works on the wharf all day unloading boxes from a conveyor belt (which is rigged into the vessel from the wharf) and further loading them onto trucks. These roles can and are changed on a daily basis, but the men with the higher seniority generally prefer to do the work of "truck riggers" as opposed to "boat riggers", and will not be on the vessel or on "navigable water" at any time of a given day. Yet the next day, the roles can be reversed. This is true despite the fact that the men hire out of the same hall, and are all participating in a direct continual (by conveyor belt) operation of unloading the cargo in a statute-covered situs. Yet, those who are selected as boat riggers on a given day would be uncovered by Petitioner's test.

should be otherwise tested, i.e., as a harbor worker, ship's repairman, etc.

Further, any ambiguity in the statute further should be liberally construed.

The Longshoremen and Harbor Workers' Compensation Act as amended, being remedial in nature, should be liberally construed in light of its humanitarian purpose. *Voris v. Eikel,* 346 U.S. 328, 74 S.Ct. 88, 98 L.Ed. 5; *Northeast Marine Terminal Co. v. Caputo,* 97 S.Ct. 2348, at p. 2359. *Reed v. The Steamship Yaka,* 373 U.S. 410 (1963), rehearing denied, 375 U.S. 872 (1963); *Nalco Chemical Corporation v. Shea,* 419 F.2d 572 (5th Cir. 1969); *Calbeck v. A.D. Suderman Stevedoring Co.,* 290 F.2d 308 (5th Cir. 1961).

A narrow construction of the Longshoremen's and Harbor Workers' Compensation Act has been, traditionally, disfavored. *Luckenbach SS Co. v. Norton,* 106 F.2d 138 (3rd Cir.).

IV.

THE COURTS SHOULD DEFER TO ADMINISTRATIVE INTERPRETATIONS OF THE ACT

It cannot be overlooked that Congress has established a statutory presumption that claims come within the act. Section 20(a), 33 U.S.C. 920(a).

Further, the Benefits Review Board, as the agency charged with administration of the Act, should be accorded great judicial deference and their decisions set aside only on a showing of the clearest abuse of discretion. *O'Leary v. Brown Pacific-Maxon, Inc.,* 340 U.S. 504;

Cardillo v. Liberty Mutual Insurance Co., 330 U.S. at 474; *Davis v. Department of Labor*, 317 U.S. at 256; *O'Keefe v. Smith, Hinchman & Grylls Associates*, 380 U.S. at 362.

Here there is certainly a reasonable legal basis for the award to the Respondent, WILL BRYANT, and it should be sustained.

CONCLUSION

It is prayed that the Judgments below be in all things affirmed.

Respectfully submitted,

ARTHUR L. SCHECHTER
Two Shell Plaza, Suite 2080
Houston, Texas 77002

Attorney for Will Bryant, Respondent

Of Counsel:

SCHECHTER & SHELTON, INC.